No. 12568

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WARNER BROS. PICTURES, INC., COLUMBIA PICTURES CORPORATION AND LOEW'S INCORPORATED, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This proceeding is before the Court on petition of the National Labor Relations Board for enforcement of its order issued against respondents on March 31, 1949 (82 N. L. R. B. 568; R. 40–52), pursuant to Section 10 (c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. III, Sec. 151, *et seq.*),[1] herein called the Act. This Court has juris-

[1] All proceedings had prior to the date of issuance of the Board's decision and order were pursuant to the provisions of the original Act (49 Stat. 449, 29 U. S. C. Sec. 151, *et seq.*). The Board found that respondents had violated Section 8 (1) of the original Act, and the language of this section was continued without change as Section 8 (a) (1) of the amended Act. Relevant portions of the original and amended Acts appear in the Appendix, *infra*, pp. 32–36.

diction under Section 10 (e) of the Act, the unfair labor practices having been committed at respondents' studios in Los Angeles, California. Respondents concede that they are engaged in interstate commerce within the meaning of the Act, and no question as to the Board's jurisdiction is presented (R. 66–68; 198–199, 712–714, 719–720).[2]

STATEMENT OF THE CASE

Upon charges filed by individual complainants[3] the Board issued its complaint (R. 57–60; 711–718), alleging that respondents (hereinafter individually called Warner, Columbia, and Loew's, respectively) had discriminated against certain employees because they had engaged in concerted activities. Following the usual hearing the Board issued its decision (R. 1–40) finding that respondents had violated Section 8 (1) of the Act by discriminatorily denying employment to the complainants, and ordered respondents to cease and desist from the unfair labor practices found, to reinstate

[2] Wherever in a series of record references a semicolon appears, references preceding the semicolon are to the Board's findings; others which follow are to the supporting evidence.

[3] Charges were filed against Warner Bros. Pictures, Inc., on behalf of employees Batchelder, De Sanctis, Gidlund, Hand, Jensen, Lamb, Lora, MacKellar, Simpson, Stoica, Bonning, White, Sapp, Larson, Rogers, and Goudie; against Columbia Pictures Corporation for employees Hentschel and Cuccia; and against Loew's Incorporated for employees Selgrath and Groth. Similar charges filed on behalf of other employees, and against other motion picture studios were dismissed by the Board (R. 20–24, 54–58; 711). The Board's complaint also named as discriminatees Seward, Howe, Coffey, and Stanley (R. 715–716), as to whom respondents contended no charge was filed. See *infra*, pp. 29–30.

and make whole some of the discriminatees, and to pay back-pay to the others (R. 40–46).[4]

I. The Board's findings and conclusions

A. Background of events preceding the strike of March 12, 1945

Respondents operate three of the ten largest motion picture studios in Hollywood. Their many thousands of employees are organized into numerous professional and labor organizations. In order to maintain a uniform bargaining position the ten major producers in Hollywood, including the respondents, had set up a Producers Labor Committee (R. 72–73; 523–527). The members of the Committee were executives of the producers, and the Committee represented the studios in their negotiations with the various labor organizations representing employees (*ibid.*) The Committee in turn appointed Fred E. Pelton as the Producers Labor Administrator, and it was Pelton's duty to meet with employee representatives, and to transmit to the producers and the unions the directives and decisions of the Committee (R. 73; 523–525, 529–532).

International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of

[4] The Association of Motion Picture Producers, Inc., was also found to have engaged in unfair labor practices and the Board ordered the Association to cease and desist from such practices and to post appropriate notices (R. 6, 40, 44–45). However, since the Association has fully complied with a similar order issued on September 7, 1948, in a companion case, *Association of Motion Picture Producers, Inc., et al.*, 79 N. L. R. B. 466, the Board is not seeking enforcement of that portion of its order directed against the Association, inasmuch as an enforcement decree against it would merely require duplication of the compliance action already taken.

the United States and Canada, hereinafter called IATSE (R. 202–203), is an industrial type union affiliated with the American Federation of Labor, with eleven locals in the Hollywood motion picture industry (R. 71, 76; 660, 749–750). Only four locals, Affiliated Property Craftsmen, Local No. 44; Motion Picture Studio Grips, Local No. 80; Motion Picture Studio Laborers and Utility Workers, Local No. 727; and Studio Electrical Technicians, Local No. 728, are here involved, because of the membership of the complainants in such locals (R. 76, n. 11; 205, 391–392, 349, 466).[5] Respondents have had bargaining contracts with IATSE covering the employees represented by that union for many years, the last contract having been executed on April 17, 1944 (R. 72–73, 76; 420–421, 748–755).

In addition to IATSE, a number of craft unions affiliated with the American Federation of Labor also represent groups of employees in the studios of respondents, and respondents had contracts with each of these organizations covering the various units over which they claimed jurisdiction (R. 80; 528, 585). These craft unions had joined together for bargaining purposes into the Conference of Studio Unions, hereinafter called C. S. U. (R. 80; 528–529).[6]

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[5] These will be referred to as Locals 44, 80, 727, and 728.

[6] Member unions of the C. S. U. included the Brotherhood of Painters, Decorators and Paperhangers of America, herein called the Painters; International Brotherhood of Electrical Workers of America, called the I. B. E. W.; International Association of Machinists, called the I. A. M.; United Brotherhood of Carpenters and Joiners of America, called the Carpenters, etc. (R. 80; 528, 733).

For many years preceding the events involved in the instant case, jurisdictional disputes arose in the studios between locals of IATSE and member unions of C. S. U. (R. 81–82; 420–421, 657–660). Some of these disputes resulted in long drawn-out strikes called by one faction or the other (*ibid.*). The strike of March 12, 1945, and the ensuing discriminatory treatment of the complainants herein arose out of such a dispute. The 1945 strike was called by the Painters because of the refusal of the motion picture producers, including the respondents, to recognize its authority over the studio interior decorators, and was immediately joined by the other unions affiliated with the C. S. U. (R. 80; 527–528, 585–586, 587, 702–704).[7]

B. The refusal of the complainants and other IATSE members to work during the strike

As soon as the C. S. U. unions walked out of the studios on March 12, IATSE pledged itself to assist the respondents to maintain production, and directed its members not to honor the C. S. U. picket lines (R. 80–83; 764). IATSE also agreed to supply the producers with labor to maintain studio operations, and instructed its membership to perform whatever duties might be assigned regardless of whether such work had previously been performed by IATSE members or by employees presently on strike (R. 83;

[7] As will be discussed hereinafter, *infra*, pp. 10, 22, the cause of the strike, and the positions of each of the parties in respect thereto, are not material to the issues in the instant case. However, for a detailed discussion of the events leading to the strike, and the arguments relative to the legality of the strike, see *Columbia Pictures Corporation*, 64 N. L. R. B. 490.

660). In addition IATSE brought in new employees to replace the strikers (R. 161, n. 71; 680–681).

Not all of the IATSE membership accepted the directives issued by its president. A number of IATSE members, including three complainants herein,[8] objected to crossing the picket lines and did not report for work until after the strike was settled (R. 108, 112, 115; 290, 449–451, 467).

The other complainants, except for Stanley,[9] although they were willing to cross the picket lines to continue in their regular duties, refused to perform work formerly done by strikers (R. 9–10, 142–143; 322, 638). Since such arrangements were not acceptable to respondents, these complainants withdrew their services altogether and they too thereafter engaged in a strike or concerted dispute with their employers (R. 9–10, 142–143; 241, 295–297, 322, 351–352, 382–385, 396–399, 440–441, 495–496, 638).

C. The strike settlement; the Cincinnati Agreement

The strike called by C. S. U. lasted from March 12, 1945, to the end of October 1945 (R. 10–12; 527–528, 722–723). Sometime in October the parties agreed to submit the dispute to the Executive Council of the Ameri-

[8] Goudie, Coffey, and Howe.

[9] Paul Stanley, a member of IATSE Local No. 728, had been employed by Warner as a lamp operator for many years (R. 115; 506–507). He continued to perform his usual duties during the strike, although on several occasions he was asked to go into the carpentry mill, where work had formerly been done only by members of the Carpenter union (R. 115–116; 507–509, 205). Stanley refused to go into the mill and about October 1, 1945, decided to discontinue working because of fear of violence on the picket lines (R. 116; 507–509).

can Federation of Labor, which met in Cincinnati, Ohio, between October 15 and October 24 (R. 11, 158; 668, 731). On the latter date the Council handed down its directive (called the Cincinnati Agreement) which reads in part as follows (R. 11, 158–160; 342, 571, 731–732):

> 1. The Council directs that the Hollywood strike be terminated immediately.
>
> 2. That all employees return to work immediately.
>
> 3. That for a period of thirty days the International Unions affected make every attempt to settle the jurisdictional questions involved in the dispute.
>
> 4. That after the expiration of thirty days a committee of three members of the Executive Council of the American Federation of Labor shall investigate and determine within thirty days all jurisdictional questions still involved.
>
> 5. That all the parties concerned * * * accept as final and binding such decisions and determinations as the Executive Council committee of three may finally render.

The Cincinnati Agreement was accepted by respondents, IATSE and C. S. U., and each of them agreed to be bound by its provisions (R. 12; 668, 682–683, 732, 798). However, a question arose as to the effect of the agreement on the status of the strikers and the replacements, and a further meeting was held in Washington, D. C., to obtain clarification of the agreement (R. 12; 668–670, 683). It was determined that for a sixty day period *all the strikers,* as well as all replacements, would be kept on the payroll, but that

respondents would determine who was actually to perform the work to be done without interference by any of the unions involved (R. 11–12; 668–670, 676–677). October 31 was set as the date for the termination of the strike and on which all strikers were to return to work (R. 12; 671).

D. The discriminatory refusal to reinstate the complainants

As noted above, *supra,* pp. 3–4, the ten major motion picture producers had created the Producers Labor Committee to establish and determine a uniform labor policy, and Fred E. Pelton, as the Producers Labor Administrator, acted on behalf of and carried out the instructions issued by the Committee. Respondents at no time denied responsibility for the acts of Pelton and of the Committee.

On October 31, 1945, as the thousands of strikers were reporting back to work in accordance with the strike settlement agreement, respondents' employment officers received the following instruction from Pelton (R. 12, 113–114; 532–536, 747):

> Members of I. A. T. S. E. who bolted from their locals and/or refused to come to work during the strike, shall not return to their regular I. A. jobs without approval of the I. A. local concerned. If you have called any of these people by mistake, explain the error to the individual and lay off such people.

This directive was issued by Pelton at the direction of the chairman of the Producers Labor Committee (R. 73–74; 534–535). It had not been requested by IATSE and had not been discussed with any official

of that organization prior to its issuance (R. 154; 271–272, 536, 539–540, 683–688).

As each of the complaints applied for reinstatement on and after October 31, they were refused employment by respondents in accordance with Pelton's instructions (R. 12, 15, n. 22, 153–154).[10] Only one of them, Hentschel, was permitted to return to work on October 31, but he too was laid off at the end of the day (R. 13, n. 18; 442–445, 590–592).

E. The Board's conclusions and its rejection of respondents' defenses

Upon the facts set forth above the Board concluded that respondents had refused to reinstate the complainants in accordance with Pelton's instructions because of complainants' concerted refusal to cross picket lines or to perform certain work assigned them during the C. S. U. strike (R. 12–17). In so concluding, the Board considered the various defenses raised by respondents and found them to be without merit. Respondents' major arguments, and the Board's treatment thereof, may be summarized as follows:

1. The alleged illegality of the strike

Respondents argued before the Board that the strike called by the C. S. U. was illegal and that the complainants, as sympathy strikers, were therefore

[10] There is no dispute that following the strike settlement agreement and the return of the C. S. U. strikers, the individual employees here involved applied for, and were refused, reinstatement. See for example, the testimony of White (R. 245–247); Stoica (R. 266–270); Batchelder (R. 282); Goudie (R. 290–291); Larson (R. 297–301), etc.

equally guilty of engaging in an unprotected activity. In addition, respondents alleged that those complainants who had refused to perform work assigned to them, although willing to continue their regular duties, were "wildcat" strikers and therefore not entitled to the protection of the Act (R. 17). The Board found it unnecessary to determine these issues since the Cincinnati Agreement provided that "all employees" were to be reinstated to their jobs for at least sixty days (R. 17–18; 668–672, 675–676, 731). Respondents, the Board found, had committed themselves to the terms of the Agreement, and thereby waived their right to assert the alleged illegal conduct of the strikers as a defense. By reinstating the thousands of C. S. U. members who had been on strike respondents indicated that the alleged illegality of the strike was not the true reason for their discrimination against the complainants (R. 17–18; 667–671, 691).

2. Respondents were not precluded by their contract with IATSE from reemploying the complainants without prior clearance by the union

Respondents contended before the Board that in requiring the complainants to obtain clearance with their IATSE locals before returning to work following the strike settlement, respondents were merely complying with the closed-shop provisions of their contracts with the union (R. 15, n. 21). The Board found that the record reveals no such requirement in the contracts, and that as long as the complainants remained members in good standing in the union they were eligible to work, and respondents could

employ them without prior clearance (R. 15, n. 21; 271–272, 286, 290, 544–545, 581, 591–592, 639–641, 645–646, 647, 751, 758). Furthermore, in only one instance, is there any contention that a union official requested any respondent to deny reinstatement to a complainant.

The exception involved the refusal of Loew's to reinstate Selgrath. William R. Walsh, Industrial Relations Manager of Loew's, stated that on or about October 31, he had been advised by IATSE's business agent, Barrett, that Selgrath was not to be rehired because he was not a member in good standing in the union (R. 16–17, n. 25; 579–580, 725–726). Selgrath was therefore denied employment until December 19, when Loew's was notified by the union that Selgrath could be reinstated (R. 134–135; 407–412). When Selgrath was rehired on December 19, he was taken on as a new employee, instead of in his former job as a key grip (R. 12–13, n. 17, 135; 411–412). The Board found, however, that by binding themselves to the terms of the Cincinnati Agreement both respondents and IATSE had in effect modified the closed-shop provision of their contract, and that until the jurisdictional dispute was finally settled the agreement that *all employees* were to be immediately reinstated to the jobs they held on March 12 superseded the closed-shop provisions in the contracts (R. 14, 16–17, n. 25; 668–669, 731).[11] The Board found therefore that Selgrath like the other complainants was denied reinstatement in accordance with Pelton's instruc-

[11] The Board did not hold that the closed-shop provisions of the contracts were thereafter void, but found that the parties had voluntarily suspended their operation for the sixty-day truce

tions, because of his participation in the strike and not because of his lack of good standing in IATSE (R. 10, n. 12, 12–17, 155–156).

3. Respondents did not deny reinstatement to the complainants because they had been replaced

Respondents argued that since the complainants were not unfair labor practice strikers, respondents had validly replaced them prior to their application for reinstatement and there were no jobs available when they applied. However, as the Board noted, if respondents did replace these strikers they also replaced the thousands of members of the C. S. U. unions who were participating in the strike (R. 18, n. 28; 558–566, 668–670, 676–679). The status of the strikers, and the replacements, was a major problem considered by the American Federation of Labor Executive Council in its attempts to resolve the issues and terminate the strike (R. 11; 562–563, 668–670). Pending the final determination of the jurisdictional dispute the Council directed, and respondents agreed, that all employees who were "on call" [12] on March 12, 1945, as well as all replacements, were to report to

period. When the union suspended or expelled eight of the complainants in June 1946, after the expiration of the truce period, the Board honored the closed-shop requirements and refused to order their reinstatement (R. 25–26; 233–234).

[12] The term "on call" is applied to regular employees actually working, or temporarily laid off and subject to recall directly by the studios without prior clearance through the unions. Temporary employees were obtained by a "call" to the local union offices who maintained a "call book" and sent job applicants to the studios as needed. (R. 93, n. 18; 234, 511, 544, 567, 581, 591–592, 597, 603, 647.)

work and be paid for the sixty-day period following October 31 (R. 11–12; 563–566, 670–671, 676–677). In accordance with that agreement all the C. S. U. members who had been replaced were permitted to return to work on October 31, and the replacements were withdrawn and paid for the sixty-day period without working (*ibid.*). The Board found, therefore, that the replacement of the complainants was not the real reason for their disparate treatment (R. 12–17).[13] It found further that the reinstatement of Hentschel and his lay-off immediately thereafter following receipt of Pelton's directive is indicative of the fact that all the complainants would have been reemployed but for respondents' desire to penalize them because they had "bolted from their locals and/or refused to come to work during the strike" (R. 13, n. 18; 442–445, 590–592).

Accordingly the Board concluded that respondents had refused to reinstate the complainants in accordance with Pelton's instruction; that the instruction was not requested by IATSE nor required by the closed shop provisions of the contracts; and that by committing themselves to the terms of the Cincinnati Agreement respondents waived their right to withhold from the complainants reinstatement to their original jobs during the truce period (R. 12–18). The Board therefore concluded that Pelton's instruction was issued for the purpose of penalizing the complainants because they had engaged in a concerted activity, and

[13] As the Board noted (R. 12, n. 16), there is no evidence in the record to support the contention that the complainants were excluded from the coverage of the Cincinnati Agreement.

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that the respondents' discriminatory refusal to reinstate the complainants constituted interference, restraint and coercion proscribed by Section 8 (1) of the Act (R. 12–19).

II. The Board's order

The Board therefore ordered respondents to cease and desist from violating Section 8 (1) of the Act (R. 40–41)—

> by discharging or refusing to reinstate any of their employees, or in any other manner discriminating in regard to their hire or tenure of employment, or any term or condition of their employment, because of their participation in concerted activities for their mutual aid or protection, or by any like or related conduct.

Affirmatively the Board awarded to each of the complainants, except Larson and Goudie,[14] back pay from the date of the discrimination practiced against him to the date when such discrimination terminated (R. 41–43),[15] and directed that ten complainants be reinstated to their former positions (R. 41–42).[16]

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[14] The Board found that following the denial of reinstatement, these complainants made no attempt to secure other employment, and that their losses of earnings were therefore willfully incurred (R. 32, 33–34).

[15] As in the case of Larson and Goudie, *supra*, the Board in each instance considered and determined whether the complainants had made reasonable attempts to obtain other employment, and curtailed the back pay awards to exclude periods of willful loss of earnings. The Board's findings and determination on this point are fully set forth in its decision (R. 26–40) and are not rediscussed here.

[16] Coffey, Cuccia, DeSanctis, Goudie, Howe, Larson, Selgrath, Seward, Simpson, and White. DeSanctis was reemployed on

Eight employees[17] were expelled or suspended from IATSE in June 1946 (R. 25–26; 233–234). In view of the closed shop contracts between IATSE and respondents, the Board found that these complainants were no longer eligible for employment in their former jobs, and that it would not effectuate the policies of the Act to order them reinstated. The Board also terminated the back pay award as to each of these complainants as of the date they were suspended or expelled (R. 25–26).[18] The other complainants had either been reinstated before the hearing or did not desire reinstatement, and they are therefore not included in the reinstatement provisions of the order.[19]

The Board also required respondents to post the usual compliance notices (R. 43, 47–52).

November 7, 1945, and Selgrath on December 19, 1945, as new employees. Since this may have involved loss of seniority, as well as pecuniary loss, the Board ordered them reinstated to their original jobs (R. 31–32, 39, 181–182; 412, 480–481, 647, 773).

[17] Batchelder, Gidlund, Hand, Hentschel, Lamb, Lora, Sapp and Stoica.

[18] Due to a typographical error the Board's decision indicates that Lora was expelled effective July 14, 1946, and back pay is terminated as of that date (R. 27–28). The record, however, shows that the disciplinary action against Lora taken by the union became effective on June 14, 1946, and that the Board intended to terminate his back pay, as it did the others, on the date of expulsion (R. 25–26; 233–234, 315, 729–730).

[19] The Trial Examiner found that Warner discriminatorily discharged 14 prop workers on March 19, 1945, for their refusal to perform struck work, and recommended that back pay for those employees should commence as of that date (R. 166, 169). The Board found that the employees in question were not discharged as of that date, and consequently did not order any back pay prior to the refusal to reinstate the strikers on and after October 31, 1945 (R. 7–10, 42).

QUESTIONS PRESENTED

1. Whether respondents, by discriminatorily denying reinstatement to certain employees because of their participation in concerted activities, engaged in unfair labor practices within the meaning of Section 8 (1) of the Act.

2. Whether the Board's order, requiring respondents to reinstate and make whole certain employees, and to pay back pay to other employees, is valid and proper.

ARGUMENT

I. Respondents' refusal to reinstate the IATSE strikers violated Section 8 (1) of the Act

When the 1945 strike ended with the acceptance by all parties of the Cincinnati Agreement, respondents reinstated all the strikers in accordance with that agreement except the group of IATSE strikers, here involved, who had refused to cross picket lines or to perform struck work. This discriminatory treatment appears on its face to violate the statutory proscription of discrimination against employees for engaging in a concerted activity. The primary question in this case, therefore, is whether respondents' defenses are sufficient in law to relieve them of what appears to be a palpable violation of the Act. Respondents contended (1) that they were required under their union shop contracts to refuse reinstatement to the IATSE strikers; (2) that the strikers had been replaced prior to their application for reinstatement; and (3) that the primary or C. S. U. strike was illegal, so that the IATSE strikers, having assisted an illegal strike, were not entitled to reinstatement. We shall show that

the Board, upon a consideration of the record and of the relevant judicial authorities, properly rejected these defenses.

A. The Board properly rejected the defense that respondents' contract with IATSE required the discharge of the strikers

The record leaves no room for doubt that respondents' refusal to reinstate the IATSE strikers was in direct response to the instruction issued through Pelton by the Producers Labor Committee that IATSE strikers were not to be reinstated until they had been approved by their local (*supra,* pp. 8–9, R. 747). Equally indisputable is the fact that respondents are responsible for the actions of the Producers Labor Committee (*supra,* pp. 3–4; R. 523–525). Indeed there is no contention that IATSE requested the Committee to issue any such instruction as that which resulted in the refusal to reinstate these strikers. On the contrary, Brewer, International Representative of IATSE, testified that IATSE had no objection to any of the complainants' returning to work, provided that their reinstatement did not result in the displacement of other IATSE members who had replaced them (R. 656, 683–688). Since the Cincinnati Agreement provided that both strikers and replacements be kept on payroll for sixty days, the complainants should have been reinstated without affecting the status of any other IATSE member during the truce period.

The closed-shop provisions of the contracts which respondents had with IATSE did not require that employees who were temporarily out of work obtain

clearance from their locals before they could be reinstated. The contracts stated only that "employees * * * shall at all times be members in good standing of the International Alliance" (R. 751, 767). There is no contention that any of the complainants were not members in good standing of IATSE during the period between October 31, 1945, and January 1, 1946, or, except in the case of Selgrath, discussed below, that the union had notified the producers that any of the strikers were not eligible for reinstatement. Moreover, the record contains substantial evidence to support the Board's finding that respondents had recalled employees to work without securing prior clearance from the union (R. 15, n. 21; 544–545, 567, 581, 591–592, 640–642, 646, 647). Consequently, even apart from the Cincinnati Agreement, respondents' contract with IATSE furnishes no defense to the refusal to reinstate the strikers. Cf. *N. L. R. B.* v. *G. W. Hume Co.,* 180 F. 2d 445, 447 (C. A. 9), and cases there cited.

The case of Selgrath stands upon a somewhat different footing, for Loew's had been advised by the union prior to Selgrath's application for reinstatement that he was not a member in good standing of IATSE. If the contract requiring union membership had been in effect when Selgrath applied for reinstatement on October 31, 1945, it would have justified the refusal to reinstate him. *Colgate-Palmolive-Peet Co.* v. *N. L. R. B.,* 338 U. S. 355. The Board found, however, that the union shop provisions had been temporarily abrogated by the Cincinnati Agreement, so that Loew's action in refusing to reinstate Selgrath was bottomed not on the inoperative union shop provisions

but on the same discriminatory policy which barred the reinstatement of the other IATSE strikers. This finding is supported by substantial evidence; indeed the clear terms of the Cincinnati Agreement admit of no other result.

The Cincinnati Agreement, it will be recalled, was a directive from the American Federation of Labor Executive Council to which all parties to the labor dispute, including IATSE and respondents, acquiesced. The agreement provided that pending the jurisdictional awards, "Each employee will return to the position he formerly occupied when the strike occurred" and that "management shall exercise its usual prerogative as to assignment of employees during the sixty-day interim period without interference on the part of the union involved" (*infra,* p. 23). The Council must have considered, and decided to hold ineffective, the closed-shop provisions of the various contracts then in effect; otherwise each union could object to the employment of any nonmember in a job it considered under its jurisdiction. Since the Cincinnati Agreement superseded the contracts in this respect, Loew's did not have to accede to the request of the local union not to reinstate Selgrath, and apparently did so because it coincided with its own desire to penalize him along with the other IATSE strikers for participating in the strike. Similarly, the reinstatement of Selgrath on December 19 as a new employee was contrary to the mandate of the Agreement that "Each employee will return to the position he formerly occupied." The Board therefore properly found that Loew's and IATSE

had waived the right to question Selgrath's reinstatement to his former position, and the refusal to reemploy him in that job because he had engaged in concerted activities constituted a violation of Section 8 (1) of the Act.

It is well established that in the absence of a valid closed-shop contract as provided for in Section 8 (3), a discharge or refusal to reinstate an employee at the request of a union violates the Act. *N. L. R. B.* v. *Electric Vacuum Cleaner Company, Inc.,* 315 U. S. 685, 693; *Colgate-Palmolive-Peet Co.* v. *N. L. R. B.,* 338 U. S. 355, 360. Since the proviso to Section 8 (3) creates an exception to the general purpose of the Act, both the proviso and contracts allegedly coming within its protection must be strictly construed. *N. L. R. B.* v. *Hume Co.,* 180 F. 2d 445, 447 (C. A. 9); *N. L. R. B.* v. *Don Juan, Inc.,* 178 F. 2d 625, 627 (C. A. 2). In the instant case there is no question as to the validity of the closed-shop contracts, except during the sixty-day truce period when the parties to the Cincinnati Agreement voluntarily suspended the operation of the closed-shop provisions for the sake of adjusting the jurisdictional disputes.[20] Since the contracts were not in effect on October 31, and during the truce period thereafter, respondents may not rely upon them as a bulwark against a finding of discrimination.

[20] The Board recognized that the union shop provisions regained their vitality after the truce period, and did not direct the reinstatement of employees thereafter suspended or expelled from the union (*supra*, p. 15).

B. The existence of replacements did not justify the discriminatory refusal to reinstate the IATSE strikers

Little need be said in disposing of respondents' contention that the IATSE strikers were not entitled to reinstatement because their jobs had been filled with replacements.[21] The record establishes that it was the directive from the Producers Labor Committee, and not the existence of replacements, which motivated respondents' refusal to reinstate these strikers (*supra,* pp. 12–13; R. 747). Any doubt of this fact would be dispelled by the case of Hentschel, who was permitted to return to work on October 31, but was laid off at the end of the day (*supra,* p. 9). Compare the language of the directive (R. 747): "If you have called any of these people by mistake, explain the error to the individual and lay off such people."

Furthermore, the Cincinnati Agreement expressly provided that all strikers be reinstated, and specifically contemplated that the replacements might be displaced (R. 668–670, 676–677, 731–732). The existence of replacements was not, therefore, any bar to the reinstatement of these strikers. Further supporting the conclusion that the existence of replacements was no bar to the reinstatement of the IATSE strikers and was not the reason respondents refused to reinstate them is the fact that respondents reinstated the C. S. U. strikers and released their replacements with pay for the sixty-day truce period (R. 18, n. 28, 161–162; 564–566, 648–649, 652–653,

[21] The Board assumed *arguendo*, that the complainants had been replaced during the strike, but made no findings in this respect (R. 18, n. 28).

670–679). In addition, this disparity of treatment as between the C. S. U. and IATSE strikers was a discriminatory act which alone would support a finding of unfair labor practices (*Hazel-Atlas Glass Co.* v. *N. L. R. B.*, 127 F. 2d 109, 118 (C. A. 4)).

C. Under the Cincinnati Agreement, respondents agreed to reinstate all strikers, and in fact reinstated all except the IATSE strikers. The alleged illegality of the strike, therefore, did not, and could not legally, furnish grounds for the failure to reinstate them

Respondents sought to justify their refusal to reinstate the IATSE strikers by contending that the primary C. S. U. strike was illegal, that the IATSE strikers were supporting this illegal strike, and that their jobs were therefore not protected by the Act under the doctrine of *N. L. R. B.* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, and *N. L. R. B.* v. *Sands Mfg. Co.*, 306 U. S. 332. The Board rejected this contention without passing upon the legality of the strike. The Board found that, even if it were to be assumed that the strike was illegal, respondents by entering into the Cincinnati Agreement, agreed to permit the strikers to return to work and thereby waived or condoned the illegal character of the strike. We shall show (1) that substantial evidence supports the Board's finding that the Cincinnati Agreement provided for the reinstatement of all strikers, and (2) that having entered into the Agreement, respondents can no longer urge the alleged illegality of the strike as grounds for the refusal to reinstate the IATSE strikers.

1. Substantial evidence supports the Board's finding that the Cincinnati Agreement provided for the unconditional return to work of all the strikers including the complainants

This case does not present the usual picture of conflicting evidence as to the intent of the parties at the time the strike settlement was agreed upon. Although it was argued before the Board that the Cincinnati Agreement was not intended to include IATSE members who had refused to carry out the union's instructions, there is not a scintilla of evidence to support that argument. On the contrary, the Cincinnati Agreement expressly provided "That *all* employees return to work immediately" (R. 11; 731, emphasis supplied). That the term "all employees" meant all strikers who had been "on call" on March 12, 1945, the date of the inception of the strike, is established beyond question by the Washington clarification conference between representatives of the unions and respondents immediately after the Cincinnati meeting (R. 11; 668–671). Following their conference a release issued October 30 by President William Green of the American Federation of Labor, stated:

> It is definitely and clearly understood that *all striking employees at Hollywood who were on call on March 12 shall return to work immediately.*
>
> *Each employee will return to the position he formerly occupied when the strike occurred.*
>
> Management shall exercise its usual prerogative as to assignment of employees during the sixty-day interim period *without interference on the part of the unions involved.* [Emphasis supplied.]

See, *Association of Motion Picture Producers, Inc.*, 79 N. L. R. B. 466, 497–498.

The Agreement was meticulously carried out as to the C. S. U. members who had participated in the strike. In fact, they not only were permitted to return to their former jobs, but the replacements were told to "standby" without working, and shortly after October 31, were paid for the full sixty-day period and ordered not to report to the studios unless called (R. 18, n. 28, 161–162; 570–571, 648–649, 652–653, 670–679). Respondents are thus in the difficult position of asserting not only that the IATSE strikers were outside the Agreement, notwithstanding explicit language to the contrary, but also that the allegedly illegal C. S. U. strikers were entitled to reinstatement. although the IATSE men who merely supported the "illegal" strikers were not. The inherent inconsistency in respondents' position serves further to support the Board's finding, already amply supported by the record, that the Cincinnati Agreement provided for the reinstatement of the IATSE strikers.

2. Having settled the strike by an agreement under which all the strikers were to resume work on October 31, respondents cannot urge the alleged unprotected character of the strike as a ground for their refusal to reinstate the complainants. Such denial of employment to the complainants for participation in the strike must therefore be viewed as discrimination against their concerted activity in violation of Section 8 (1) of the Act

The law is well-settled that where an illegal strike is settled by an agreement providing for the reinstatement of all strikers, the employer may not thereafter rely upon the illegality of the strike to justify discriminatory treatment of the strikers. *N. L. R. B.* v. *Aladdin Industries, Inc.*, 125 F. 2d 377, 382 (C. A. 7),

certiorari denied, 316 U. S. 706; *Stewart Die Casting Corp.* v. *N. L. R. B.*, 114 F. 2d 849, 853–856 (C. A. 7), certiorari denied, 312 U. S. 680; *Hazel-Atlas Glass Co.* v. *N. L. R. B.*, 127 F. 2d 109, 118 (C. A. 4); *N. L. R. B.* v. *Mt. Clemens Pottery Co.*, 147 F. 2d 262, 267 (C. A. 6); see also *N. L. R. B.* v. *Reed & Prince Mfg. Co.*, 118 F. 2d 874, 886 (C. A. 1), certiorari denied, 313 U. S. 595. Consequently the Board found it unnecessary in this case [22] to pass upon the contention that the strike was illegal. The Board held in accordance with the cases cited above that even if the strike had been illegal, respondents, having agreed to reinstate all strikers, could not thereafter rely upon the alleged illegality of the strike to justify its discrimination against some of them.

As the court stated in the *Aladdin* case, where the employees had been discharged for engaging in a sit-down strike and defying a court injunction (125 F. 2d at 382): [23]

[22] Actually the Board found in another proceeding that the strike was not illegal. *Columbia Pictures Corp*, 64 N. L. R. B. 490, 505–515.

[23] As the court noted, the employees in the *Aladdin* case had been discharged because of their illegal conduct, but these discharges were abrogated by the subsequent settlement agreement. In the instant case respondents contended that the Warner propmakers were actually dismissed on March 19, and that the other IATSE strikers were constructively discharged. The Board found that the alleged dismissal of the propmakers was but a "tactical maneuver" to induce these employees to perform struck work, and that actually none of the IATSE strikers were discharged (R. 7–10). Since the Cincinnati Agreement clearly provided for the return to work of all strikers "on call" as of March 12, the day the strike started, it is immaterial under the *Aladdin* doctrine whether any of the complainants were discharged after March 12 for participating in the strike.

We can thus safely and fairly narrow our issues to the date which marked the opening of the plant, after the March, 1937, sit down strike. If we were to go back of March 2, the employees would be without right—for their sit down strike and their refusal to obey the order of the court, followed by their discharge because of such action, lost to them the right they otherwise might have enjoyed as employees, with an unsettled labor dispute.

On the other hand, it would be unfair, in view of this settlement to give to respondent a right which it deliberately and, as we believe, wisely, waived in the interests of peace and harmony. *When respondent invited its employees to return to their old places, regardless of the sit down strike, it waived its right to treat the employees as though they were wrong doers* * * *.

* * * * *

Viewing the situation as we do, namely, that a settlement of mutual claims and grievances took place, we assume, and conclude, that grievances antedating said settlement which marked the reopening of the plant, were, by respondent, fully and completely waived. [Emphasis supplied.]

The holding of the *Aladdin* case, and of the other cases cited *supra,* pp. 24–25, is *a fortiori* applicable here where the conduct of the IATSE strikers was not marked by violence, defiance of the courts, seizure of respondents' property, or even breach of a no-strike

clause.[24] If their strike could properly be characterized as illegal at all, it derived that character solely from the allegedly illegal character of the C. S. U. strike. Yet respondents had no hesitation in reinstating the C. S. U. members, and in abandoning as to them its argument that the strike was illegal. Under such circumstances even if respondents were "under no legal compulsion to take the strikers back * * * when their breach was overlooked, and it was decided to reinstate them, they were entitled to even handed treatment, and the exclusion of any of them for reasons condemned by the statute would have been an unfair labor practice." *Hazel-Atlas Glass Co.* v. *N. L. R. B.,* 127 F. 2d 109, 118 (C. A. 4).

Having waived the allegedly unprotected nature of the strike, respondents have no reasonable explanation for the issuance of the Producers Labor Committee's instruction to discriminate against the complainants. In fact, respondents attempted to

[24] This case does not present the question of employees refusing to accept changes in working conditions but continuing to stay on the employer's premises to perform only that work which they are willing to perform. Compare, *G. C. Conn, Ltd.* v. *N. L. R. B.*, 108 F. 2d 390, 397 (C. A. 7); *N. L. R. B.* v. *Montgomery Ward Co.*, 157 F. 2d 486, 496 (C. A. 8). Here all of the complainants who refused to perform struck work left the studios as soon as it became apparent that they could not continue in their own duties without also performing the work formerly done by the carpenters and painters, and stayed away as full-fledged, not "part-time" strikers (R. 10). Compare, *Home Beneficial Life Ins. Co.* v. *N. L. R. B.*, 159 F. 2d 280 (C. A. 4), certiorari denied, 332 U. S. 758.

avoid the fact that the complainants were not reinstated in accordance with the instruction by urging other reasons for their action. However, these reasons are equally without merit, see *supra,* pp. 17–24, and the Board properly concluded that but for the desire of the Producers Labor Committee to chastise the complainants because they had refused to cooperate with respondents during the strike, these employees would have been reinstated at the time that all other strikers were permitted to return to work. The instruction not to reinstate the complainants, which was put into effect by respondents, constituted an unwarranted restraint upon the employees' right to engage in concerted activity, and therefore violated Section 8 (1) of the Act.

II. The Board's order is valid and proper

The cease and desist provisions of the Board's order (R. 40–41) are specifically designed to remedy the unfair labor practice found, and an order of such limited character is clearly warranted under Section 10 (c) of the Act. Cf. *N. L. R. B.* v. *Express Publishing Co.,* 312 U. S. 426, 437–438; *May Department Stores Co.* v. *N. L. R. B.,* 326 U. S. 376, 389–393; *N. L. R. B.* v. *Sun Tent-Luebbert Co.,* 151 F. 2d 483, 489 (C. A. 9).

The Board's authority to remedy violations of Section 8 (1) of the Act involving discrimination against employees by directing reinstatement with back pay is well established. *Gullet Gin Co. Inc.* v. *N. L. R. B.,* 179 F. 2d 499, 502 (C. A. 5); *N. L. R. B.* v. *Austin Co.,* 165 F. 2d 592, 596 (C. A. 7); *N. L. R. B.* v.

Phoenix Mutual Ins. Co., 167 F. 2d 983, 988–989 (C. A. 7); *N. L. R. B.* v. *Vail Mfg. Co.,* 158 F. 2d 664, 667 (C. A. 7), certiorari denied, 331 U. S. 835. The inclusion among the complainants of supervisory personnel, such as White and Sapp (R. 37, n. 57) has not heretofore been questioned by respondents (cf. *N. L. R. B.* v. *Cheney California Lumber Co.,* 327 U. S. 385) and in any event it is settled that discrimination against supervisors who were "employees" under the Wagner Act may still be remedied by the Board despite the 1947 amendment to Section 2 (3) of the Act. See *Eastern Coal Corp.* v. *N. L. R. B.,* 176 F. 2d 131, 137 (C. A. 4); *N. L R. B.* v. *Universal Camera Corp.,* 179 F. 2d 749, 754–755 (C. A. 2), certiorari granted, 339 U. S. 962; *Foreman's Assn. of America* v. *Budd Mfg. Co.,* 169 F. 2d 571, 575, certiorari denied, 335 U. S. 908.

Respondents argued before the Board that the Board could not remedy the refusal to employ Seward, Coffey, Howe, and Stanley because no charge had been filed in their behalf (R. 6; 708). The record, however, establishes that complainants' attorney had submitted a charge to the Board's Regional Office for Seward, Coffey and Howe, but that through some administrative oversight in the Regional Office the charge was never docketed (R. 7, n. 5; 610–613, 704–709). Furthermore, respondents' counsel admitted that he had discussed the case of Seward, Coffey, and Howe with a Field Examiner of the Board, and was therefore fully apprised of the fact that these employees were alleging that they had received discriminatory treatment (R. 7, n. 5; 708–709). And the

Board's original Complaint, issued about two months before the hearing, specifically alleged that respondents had discriminatorily denied employment to all four employees (R. 7, n. 5; 110). As the Board noted therefore, respondents had ample notice that the Board intended to process the cases of Seward, Coffey, Howe, and Stanley, and have failed to show that they were in any manner prejudiced by the lack of a formally docketed charge (*ibid.*).

Furthermore, respondents' contention that the Board may not grant affirmative relief to these complainants is based upon a misconception as to the purpose of the charge. "It merely sets in motion the machinery of an inquiry." *N. L. R. B.* v. *Indiana & Michigan Electric Co.,* 318 U. S. 9, 18. Once charges have been filed the Board may thereafter consider and remedy unfair labor practices similar to those alleged, even though not specifically set forth in the charges, particularly, where as here, they were covered in the complaint, respondents had ample opportunity to defend, and they have failed to show that they were prejudiced. *Consolidated Edison Co.* v. *N. L. R. B.,* 305 U. S. 197, 224–225; *National Licorice Co.* v. *N. L. R. B.,* 309 U. S. 350, 369; *Consumers Power Co.* v. *N. L. R. B.* 113 F. 2d 38, 42 (C. A. 6); *N. L. R. B.* v. *American Creosoting Co.,* 139 F. 2d 193, 195 (C. A. 6); *N. L. R. B.* v. *Nebel Knitting Co.,* 103 F. 2d 594 (C. A. 4), enforcing as modified 6 NLRB 284; *N. L. R. B.* v. *Bird Machine Co.,* 161 F. 2d 589 (C. A. 1), enforcing 65 NLRB 311, 316.[25] It is unnecessary to consider here

[25] See also, *Fort Wayne Corrugated Paper Co.* v. *N. L. R. B.,* 111 F. 2d 869, 873 (C. A. 7); *Stewart Die Casting Corp.* v. *N. L. R. B.,* 114 F. 2d 849, 856–857 (C. A. 7); *Red Arrow Freight Lines, Inc.* v. *N. L. R. B.,* 180 F. 2d 585, 587 (C. A. 5).

whether the 1947 amendment to Section 10 (b) of the Act restricts the Board to violations named in the charge.[26] The amendment, being purely procedural, is not retroactive, and hence is not applicable to this proceeding which was commenced prior to the effective date of the amendments. *N. L. R. B.* v. *Itasca Cotton Mfg. Co.,* 179 F. 2d 504 (C. A. 5); *N. L. R. B.* v. *Brozen,* 166 F. 2d 812, 813 (C. A. 2); *N. L. R. B.* v. *National Garment Co.,* 166 F. 2d 233, 238 (C. A. 8), certiorari denied, 334 U. S. 845; cf. *Cathey Lumber Co.,* 86 NLRB 157.

CONCLUSION

For the reasons stated it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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SEPTEMBER 1950.

[26] Section 10 (b) as amended, provides in part:

Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, * * * shall have power to issue and cause to be served upon such person a complaint * * *: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing [and service] of the charge * * *.

APPENDIX

1. The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C., Secs. 151 *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage

membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, Secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. * * * In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

2. The relevant provisions of the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C., Supp. III, Sec. 141, *et seq.*) are as follows:

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * *

"SEC. 2. When used in this Act—* * *

(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

"(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * * * *

"SEC. 8 (a). It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

"SEC. 10 (c). The testimony taken by such member, agent, or agency of the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order, and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the

Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *."

SEC. 104. The amendments made by this title shall take effect sixty days after the date of the enactment of this Act, except that the authority of the President to appoint certain officers conferred upon him by section 3 of the National Labor Relations Act as amended by this title may be exercised forthwith.

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